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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-428

CHESTER McKINNEY,
Petitioner,

vs.

JAMES C. PARSONS, in His Capacity as Chief of Police
of the City of Birmingham, Alabama,
Respondent.

BRIEF

In Opposition to a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

Page

I. There Are No Special or Important Reasons for Granting Certiorari 1

II. The Ordinance Is Constitutional as Authoritatively Construed 2

The Federal Questions Here Involved Has Been Determined by This Court 4

No Independent Review by This Court of the Materials Here Is Required 5

Conclusion 6

Table of Cases Cited

Amato v. Devine, 496 F.2d 441, vacated 419 U.S. 1014, 95 S.Ct. 487, 42 L.Ed.2d 288 5

Blank v. California, — U.S. —, 95 S.Ct. 193 3

Brown, etc. v. U.S., — U.S. —, 94 S.Ct. 3215 3

Bryant v. N.C., — U.S. —, 95 S.Ct. 238 3

Cangiano et al. v. U.S., — U.S. —, 94 S.Ct. 3223 3

Cangiano v. U.S., — U.S. —, 95 S.Ct. 188 3

Carlson, et al. v. U.S., — U.S. —, 94 S.Ct. 3213 3

City of Tacoma v. Lewis, 513 P. 2d 85 4

Cote v. U.S., — U.S. —, 94 S.Ct. 3217 3

Dyke v. Georgia, — U.S. —, 95 S.Ct. 1687 3

Enskat v. California, — U.S. —, 94 S.Ct. 3225 3

Goldstein v. Com. of Va., — U.S. —, 95 S.Ct. 202 3

Hamling v. U.S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 59 ..... 2, 4, 5

Harding, etc. v. U.S., — U.S. —, 95 S.Ct. 1437 3

Harlow, et al. v. Birmingham, 52 Ala. App. 612, 296 So. 2d 202, Cert. den. 292 Ala. 722, 296 So. 2d 206, Cert. den. U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975) .. 2, 3

Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L. Ed.2d 642 (1974) 2, 4

J-R Distributors, Inc., et al. v. State of Washington, — U.S. —, 94 S.Ct. 3217 3

Kaplan v. California, — U.S. —, 95 S.Ct. 194 3

Kaplan v. U.S., — U.S. —, 94 S.Ct. 3229 3

Keating v. Vixen, 301 N.E.2d 880 3

McKinney v. City of Birmingham, 52 Ala. App. 605, 296 So. 2d 197, Cert. den. 292 Ala. 726, 296 So.2d 202, Cert. den. — U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975) 2

Miller v. California, 413 U.S. 15 (1973) 2, 3, 4, 5, 6

Miller v. Robert Emmett Gardrich Corp., etc., 218 N.W. 2d 771 3-4

Nebraska v. Little Art Corp., 215 N.W.2d 853 3

Paris Adult Theatre I, et al. v. Slaton, — U.S. —, 94 S.Ct. 3227 3

Price v. Comm. of Va., — U.S. —, 95 S.Ct. 186 3

Redrup v. N. Y., 386 U.S. 767 6

Rhodes v. State, 283 So. 2d 351 3

Richards v. State, 497 S.W. 2d 770 4

Shuttlesworth v. City of Birmingham, 382 U.S. 87 S.Ct. 211, — L.Ed. 2d — 2

Sians v. U.S., — U.S. —, 94 S.Ct. 3215 3

State ex rel. Chabot v. Circuit Court, 61 Wis. 2d 354, 212 N.W. 2d 690 (1973) 5

State ex rel. Sensenbrenner v. Bookstore, 301 N.E. 2d 695 4

Stroud v. State, 300 N.E. 2d 100 3

Sulaiman et al. v. U.S., — U.S. —, 95 S.Ct. 192 3

Thevis & Peachtree News, Inc. v. U.S., — U.S. —, 94 S.Ct. 3222 3

Tobolina v. California, — U.S. —, 95 S.Ct. 201 3

U.S. v. 37 Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed. 2d 822, Reh. den. 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702 2

U.S. v. Thevis, 484 F.2d 1149 (1973) 2

U.S. v. Wasserman, 504 F.2d 1012 (1975) 2

Village Brooks, Inc., et al. v. Marshall, — U.S. —, 94 S.Ct. 3220 3

Winslow v. Comm. of Va., — U.S. —, 95 S.Ct. 189 3

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BRIEF

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REASONS FOR DENYING THE WRIT

I

There Are No Special or Important Reasons for Granting Certiorari.

The petition for a writ of certiorari filed in this case fails to set out any special or important reasons for granting such. In fact, the opinion as quoted therein as "Exhibit A", pages A-1 through A-14 (513 F.2d 264) on its face is in complete accord

with the decisions of this court prior to and subsequent to *Miller v. California*, 413 U.S. 15 (1973) and companion cases. In any event, the petitioner was given the benefit of any doubt as to which test to apply since the Fifth Circuit Opinion clearly states that this issue was resolved in favor of petitioner in affirming the denial of relief by the District Court and the court cites and points to *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 59, *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), and its own opinions in *U.S. v. Thevis*, 484 F.2d 1149 (1973) and *U.S. v. Wasserman*, 504 F.2d 1012 (1975). Therefore, the petitioner attempts merely to obtain a review of this decision by advancing the same argument that the ordinance under which he was convicted was unconstitutional as written and applied.

II

The Ordinance Is Constitutional as Authoritatively Construed.

The Birmingham Ordinance No. 67-2 is alleged to be unconstitutional as written and applied when the convictions here occurred and his argument ignores that under the dictates of *Miller* as followed by the Fifth Circuit in this case the ordinance as authoritatively construed by the Alabama Appellate Courts, must be followed by the federal courts. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 S.Ct. 211, — L.Ed. 2d —; *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed. 2d 822, Reh. den. 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702.

The petitioner argues that the *Miller* series of cases require strict specificity in describing proscribed sexual conduct and that the ordinance prior to and after its authoritative construction in *McKinney v. City of Birmingham*, 52 Ala. App. 605, 296 So. 2d 197, Cert. den. 292 Ala. 726, 296 So.2d 202, Cert. den. — U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975), and *Harlow, et al v. Birmingham*, 52 Ala. App. 612, 296 So. 2d 202, Cert.

den. 292 Ala. 722, 296 So. 2d 206, Cert. den. U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975) remains unconstitutional in that it still lacks specificity.

This contention is contrary to various decisions of other appellate courts which have authoritatively construed ordinances and statutes in accordance with the *Miller* series of cases. In other words, many cases decided since *Miller* involved pending direct appeals of pre-*Miller* convictions based on *Roth-Memoirs* principles in which cases the courts construed the law involved to meet the standards of *Miller*. Most of those cases this court vacated and remanded in the light of *Miller* have been since reaffirmed by the state or federal court from which they came, and this court has either denied certiorari or dismissed direct appeals of these reaffirmances. See *Price v. Comm. of Va.*, — U.S. —, 95 S.Ct. 186; *Cangiano v. U.S.*, — U.S. —, 95 S.Ct. 188; *Winslow v. Comm. of Va.*, — U.S. —, 95 S.Ct. 189; *Sulaiman et al. v. U.S.*, — U.S. —, 95 S.Ct. 192; *Blank v. California*, — U.S. —, 95 S.Ct. 193; *Kaplan v. California*, — U.S. —, 95 S.Ct. 194, *Tobolina v. California*, — U.S. —, 95 S.Ct. 201; *Goldstein v. Com. of Va.*, — U.S. —, 95 S.Ct. 202; *Bryant v. N.C.*, — U.S. —, 95 S.Ct. 238; *Harding, etc. v. U.S.*, — U.S. —, 95 S.Ct. 1437; *Dyke v. Georgia*, — U.S. —, 95 S.Ct. 1687. See also *Carlson, et al. v. U.S.*, — U.S. —, 94 S.Ct. 3213; *Sians v. U.S.*, — U.S. —, 94 S.Ct. 3215; *Brown, etc. v. U.S.*, — U.S. —, 94 S.Ct. 3215; *Cote v. U.S.*, — U.S. —, 94 S.Ct. 3217; *J-R Distributors, Inc., et al. v. State of Washington*, — U.S. —, 94 S.Ct. 3217; *Village Books, Inc., et al. v. Marshall*, — U.S. —, 94 S.Ct. 3220; *Thevis & Peachtree News, Inc. v. U.S.*, — U.S. —, 94 S.Ct. 3222; *Cangiano et al. v. U.S.*, — U.S. —, 94 S.Ct. 3223; *Enskat v. California*, — U.S. —, 94 S.Ct. 3225; *Paris Adult Theatre I, et al. v. Slaton*, — U.S. —, 94 S.Ct. 3227; *Kaplan v. U.S.*, — U.S. —, 94 S.Ct. 3229. Also, see State Court cases of: *Nebraska v. Little Art Corp.*, 215 N.W.2d 853; *Keating v. Vixen*, 301 N.E. 2d 880; *Rhodes v. State*, 283 So. 2d 351; *Stroud v. State*, 300 N.E. 2d 100; *Miller v. Robert*

Emmett Gardrich Corp., etc., 218 N.W. 2d 771; *Richards v. State*, 497 S.W. 2d 770; *City of Tacoma v. Lewis*, 513 P. 2d 85; *State ex rel. Sensenbrenner v. Bookstore*, 301 N.E. 2d 695.

The state statute involved in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974), was similar to the ordinance here involved and lacked specificity until the Georgia Courts authoritatively construed it to meet *Miller* standards. This court granted certiorari there and did not disturb that construction. The case was reversed on the ground that the film made the basis of that action was simply not obscene as a matter of law.

It follows then that the ordinance here was not impermissibly construed and the definition of obscenity was limited effectively to those examples given in *Miller*. Such action does not violate adequate notice requirements. *Hamling v. U. S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590. Of course, this authoritative construction applies only to any convictions prior to *Miller* because after the *Miller* decision the ordinance was amended so as to contain a definition of specific sexual conduct deemed to be obscene. The construction is adequate for the purpose of complying with *Miller* in so far as the instant case is concerned.

The Federal Question Here Involved Has Been Determined by This Court.

The Alabama cases cited in the Fifth Circuit's decision and supra arose subsequent to those here in question, but the affirmances were subsequent to *Miller*. This Court has already denied certiorari in both those cases (cited supra) in which the Petitions for a Writ of Certiorari had adequately set out the same issues as are sought to be again reviewed in this petition. The difference is that these present cases were not on direct appeal, but involved final convictions being collaterally attached via a

Habeas Corpus proceeding. In *Hamling*, supra, it appeared that this court was saying that a final conviction prior to *Miller* would not be reviewed in the light of *Miller*, but judged on the law as it was at the time of conviction. However, the subsequent vacating and remanding of *Amato v. Devine*, 496 F.2d 441, Vacated 419 U.S. 1014, 95 S.Ct. 487, 42 L.Ed.2d 288, a final conviction pre-*Miller*, case in the light of *Hamling*, supra, and *State ex rel. Chabot v. Circuit Court*, 61 Wis. 2d 354, 212 N.W. 2d 690 (1973), settled that point. The Circuit Court accordingly has given the petitioner here any benefits that the *Miller* series of cases may have created. In any event, all of the federal questions raised in the petition have been previously determined against petitioner and are now settled questions leaving no substantial federal questions to be answered. (See cases cited above.)

No Independent Review by This Court of the Materials Here Is Required.

No review by this court of the materials involved in the six cases made the basis of this petition is required unless a writ *is granted. Jenkins v. Georgia*, supra, *Jacobellis v. Ohio*, 378 U.S. 184. Respondent can not find a case which has held that an automatic review of any case by this court is either assured or a right simply because it involves obscenity. The material here was viewed by the state circuit court, the federal district court magistrate in the first case, the federal district court judge after remand, and the three-judge panel of the Fifth Circuit Court of Appeals of the United States. All deemed the materials to be legally obscene and in the review of the Fifth Circuit petitioner was given the benefit of any doubts as to the applicability of *Miller* and an authoritative construction of the ordinance under which he was convicted. For this court now to again view the material would be undercutting the judgments below unnecessarily.

The prior reversal of numerous cases on a now-abandoned practice of merely citing *Redrup v. N. Y.*, 386 U.S. 767, does not mandate a review of these cases or the material involved. Clearly that practice and the argument it created is not applicable to pending cases on direct appeal at the time of the *Miller* decision, nor the cases thereafter on direct appeal, and also should not now be applied to a collateral attack on final convictions prior to Miller coming to this court via Habeas Corpus proceedings.

CONCLUSION

A Writ of Certiorari in this case should be denied for there are no special and important reasons to grant an additional and unnecessary review of the judgment below which was rendered in accordance with prior decisions of this court and is in harmony with the spirit of those decisions.

Respectfully submitted,

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